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No. 09-294

In the Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,
PETITIONERS

v.

DAVID KANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld summary judgment for the United States on petitioners' common law tort claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, because petitioners failed to establish that the federal agents acted unreasonably under Virginia law in their execution of a lawful search warrant at petitioners' home.

2. Whether the court of appeals erred in applying the FTCA's judgment bar—which provides that a judgment in an action under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. 2676—to preclude *Bivens* claims that had been brought together in the same lawsuit as the FTCA claim, an argument petitioners failed to raise before the court of appeals.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 565 F.3d 103. The opinions of the district court (Pet. App. 57a-78a, 79a-80a, 81a-102a, 103a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. On July 27, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides a limited waiver of sover-

eign immunity for claims against the federal government based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1). The FTCA permits suit against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). See 28 U.S.C. 2674 (making United States liable "in the same manner and to the same extent as a private individual under like circumstances").

The FTCA places a variety of limits on the United States' waiver of its immunity. For example, the FTCA excludes from the waiver of immunity claims arising out of the exercise of a discretionary function. 28 U.S.C. 2680(a). In addition, the FTCA's judgment bar, 28 U.S.C. 2676, protects the government from the need to defend multiple actions against itself and the federal employee whose acts gave rise to the injury. The FTCA's judgment bar provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Ibid.*

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, which makes an action against the United States under the FTCA the plaintiff's sole remedy for most claims. 28 U.S.C. 2679(b)(1). If the plaintiff sues a federal employee for acts within the scope of his employment, the United States is substituted as the defendant and the suit proceeds as one under the FTCA. 28 U.S.C.

2679(d)(1). Congress made an exception to the Westfall Act's exclusivity and substitution provisions for claims against employees for violating the Constitution. 28 U.S.C. 2679(b)(2)(A). The FTCA's judgment bar, however, contains no such exception.

2. In March 2002, as a part of an extensive, multi-agency investigation of a group of organizations and persons suspected of supporting international terrorism, federal investigators obtained a search warrant for a number of locations, including the home of Dr. Iqbal Unus. Pet. App. 3a. The affidavit supporting the warrant explained that many of the organizations had overlapping leadership comprised of persons suspected of supporting terrorism. *Id.* at 7a. The affidavit detailed transactions among the organizations, including entities in which Dr. Unus held positions, which seemed to serve no logical business or charitable purpose, and it explained that efforts to trace the funds through overseas transactions had met a dead end. *Id.* at 6a-8a. The warrant authorized agents to seize from Dr. Unus's home certain items that might be evidence of money laundering, tax evasion and extending material support to terrorists abroad. *Id.* at 9a.

Federal agents arrived at Dr. Unus's home to execute the warrant at approximately 10:30 a.m. Pet. App. 9a. The lead agent pounded on the front door and ordered the occupants to open it. *Ibid.* Petitioner Aysha Unus (Dr. Unus's wife) was in the living room at the rear of the house, and petitioner Hanaa Unus (one of the Unus's daughters) was sleeping upstairs. *Ibid.* Aysha Unus heard the pounding on the door and a voice ordering her to open it. *Ibid.* She moved toward the door, coming within about 15 feet of it, and saw a gun through a side window. *Ibid.* The agents saw her through the

side window come toward the door and then, in response to the demand that she open the door, "run 'down the hallway to the back of the house'" without opening it. *Id.* at 27a.

Aysha Unus began screaming for Hanaa Unus and moved toward a door at the back of the house. Pet. App. 10a. Hanaa Unus came down the stairs and joined Aysha Unus at the back of the house, where they began to place a phone call. *Ibid.* The agents then broke down the front door with a battering ram. *Ibid.* The agents came into the room, at least one with a gun drawn, and ordered the women to drop the phone and put their hands up. *Ibid.* The agents encountered "hectic conditions" on entry; there was "'excitement' in [petitioners'] voices, and [petitioners] were 'clearly concerned and worried and agitated,'" to the extent that their behavior suggested to the agents that there was some "possibility that [petitioners] would take some action that would make an unstable situation." *Id.* at 32a. The agents ordered petitioners to sit on couches in the living room and handcuffed them with their hands behind their backs. *Id.* at 10a.

The agents then began to search the premises. During the search, petitioners remained handcuffed for nearly four hours. Pet. App. 32a. The agents "reassessed the situation as the search progressed," moving the handcuffs to the front to make petitioners more comfortable, allowing them to use the restroom, and allowing Aysha Unus to self-administer her diabetes medication. *Id.* at 10a, 33a. Around 2 p.m., petitioners informed the officers that they were obliged to perform afternoon prayers, in accordance with their Muslim faith. *Ibid.* An agent removed their handcuffs, allowing them to perform their prayers. *Ibid.* The agents did

not allow petitioners to pray outside of the presence of male agents, or allow petitioners to wear head scarves or cover their hands while the male agents were present, or while being photographed. *Id.* at 11a. After petitioners concluded their prayers, they were not handcuffed again, but remained confined to the living room for the duration of the search. *Ibid.* At the conclusion of the search, the agents left petitioners with a copy of the warrant and a written inventory of the items seized. *Ibid.*

3. Petitioners brought suit against the agents, asserting claims for common law torts of assault-and-battery and false imprisonment as well as constitutional claims under *Bivens* v. *Six Unknown Named Federal Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), for asserted violations of petitioners' rights under the First and Fourth Amendments to the United States Constitution. Pet. App. 11a-13a.[1] The United States was substituted as defendant on the common law tort claims. *Id.* at 18a. Those claims were initially dismissed for failure to exhaust administrative remedies; after exhausting those remedies, petitioners refiled their claims under the FTCA as part of an amended complaint. *Id.* at 18a-20a.

On February 3, 2006, the district court dismissed petitioners' Fourth Amendment *Bivens* claim on the ground that the individual defendants were entitled to qualified immunity. Pet. App. 73a-74a, 76a. The court held that it was not clearly established that the agents' conduct in detaining and handcuffing petitioners during the execu-

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[1] Petitioners also sued the agent whose affidavit supported the search warrant and another individual who had provided information in support of the affidavit. Pet. App. 5a, 12a-13a. Those claims were dismissed, *id.* at 13a-15a, and are not at issue in the petition.

tion of the search warrant would violate petitioners' constitutional rights. *Id.* at 73a-74a. The court later dismissed petitioners' First Amendment *Bivens* claims on statute of limitations grounds. See *id.* at 20a.

On November 2, 2007, the district court granted summary judgment in favor of the United States on petitioners' FTCA tort claims. Pet. App. 81a-103a. The court explained that there was no genuine issue of material fact with regard to the reasonableness of the federal agents' actions during the search, and that summary judgment was therefore appropriate. *Id.* at 97a-98a, 101a-102a. After holding for the United States on the FTCA claims, the court denied petitioners' motion to reconsider the dismissal of petitioners' First Amendment *Bivens* claims on statute of limitations grounds. The court concluded that its grant of summary judgment to the United States on the FTCA claims "moot[ed] any issue * * * whether or not any of the individual defendants should be in this case." *Id.* at 101a.

4. The court of appeals affirmed. Pet. App. 1a-56a. As relevant here, petitioners argued that the district court erred in granting summary judgment to the United States on their FTCA claims for assault-and-battery and false imprisonment, and that the judgment bar did not apply to their First Amendment *Bivens* claim because that claim did not arise out of the same subject matter as their FTCA claims. The court of appeals rejected those arguments.

The court observed that petitioners' FTCA claims were governed by "the substantive law of the state where the alleged tort took place: in this case, the law of the Commonwealth of Virginia." Pet. App. 24a. The court determined that, under Virginia law, petitioners' false imprisonment and assault and battery claims would

each fail if the restraint on liberty or unwanted touching was legally justified. *Id.* at 24a-25a. Police officers' use of force or restraint is justified, under state law, if "reasonable" in "execut[ing] their lawful duties." *Id.* at 25a. Thus, the court characterized the central question as whether "the federal agent defendants acted reasonably under Virginia law." *Ibid.*

The court noted that, in a criminal case, the Virginia Supreme Court had stated that an "officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia." *Ibid.* (quoting *Lewis* v. *Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997)). Noting the priority of officer safety under Virginia law, *id.* at 26a, the court concluded that the federal agents acted reasonably in the execution of the search warrant. The court observed that the agents "were executing a facially valid search warrant" that authorized them to search for financial documents relating to financing of international terrorism. *Id.* at 30a-31a. The Court also concluded that, even though they were "searching for financial documents only," the agents acted reasonably in handcuffing petitioners for a period of slightly less than four hours during the search because the search was being conducted "at a residence believed to contain evidence of money laundering by entities suspected of assisting international terrorism," where, "[v]iewed objectively, [they] did not know whether they would be confronted by resistance," and because they encountered "hectic conditions" upon entry that suggested that there was a "possibility that [petitioners] would take some action that would make an unstable situation." *Id.* at 31a-32a.

Finally, the court rejected petitioners' argument that the FTCA judgment bar did not preclude their *Bivens* claims because those claims "are predicated on different conduct and allege distinct injuries from the FTCA claims." Pet. App. 35a. The court rejected that narrow construction of the judgment bar, holding that it precludes all *Bivens* claims "arising out of the same actions, transactions, or occurrences" as the FTCA claim. *Ibid.* (quoting *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005)). The court explained that the FTCA claims and *Bivens* claims "arose out of the 'same subject matter' * * * —the execution of the Warrant—by the 'employee of the government whose act or omission gave rise to the claim.'" *Id.* at 36a (citation omitted). The FTCA judgment therefore barred petitioners' *Bivens* claims based on the execution of the warrant. *Ibid.*

ARGUMENT

Petitioners ask this Court (Pet. 9-21) to determine whether the federal agents' conduct in executing the search warrant violated petitioners' Fourth Amendment rights. That issue is not directly presented here. The court of appeals addressed whether "the federal agent defendants acted reasonably under Virginia law," Pet. App. 25a, a question of state law that does not warrant this Court's review. The court of appeals' consideration of the Fourth Amendment was subsumed entirely in resolving the reasonableness of the agents' actions under state law. The court's analysis of that question was correct and does not conflict with any decision of this Court or another court of appeals. Petitioners also seek this Court's review (Pet. 21-25) of the question whether the judgment on an FTCA claim can bar a *Bivens* claim

asserted within the same suit. Petitioners did not raise that argument in the court of appeals and should not be permitted to raise it for the first time before this Court. In any event, the court of appeals' application of the judgment bar is correct, and petitioners overstate the extent of any circuit conflict. Review by this Court is therefore unwarranted.

1. Petitioners mischaracterize the court of appeals as having ruled, "[w]ith respect to petitioners' Fourth Amendment claim," that the federal agents' actions were constitutional. Pet. 5. The court of appeals did not rule on the merits of petitioners' Fourth Amendment claim, which was asserted only against the individual agents, holding instead that that claim was precluded by the FTCA's judgment bar. Pet. App. 36a. The part of the court of appeals' decision cited by petitioners as addressing their "Fourth Amendment claim," see Pet. 5-7 (quoting Pet. App. 30a-33a), was in fact an analysis of petitioners' "false imprisonment and battery claims," Pet. App. 28a, under Virginia law, as made applicable under the FTCA, *id.* at 24a-25a. The court of appeals' resolution of that state law question was correct and does not warrant this Court's review.

a. Because the FTCA makes the United States' liability turn on "the law of the place where the act or omission occurred," 28 U.S.C. 1346(b)(1), the relevant question is whether "local law would make a 'private person' liable in tort." *United States* v. *Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. 1346(b)(1) (emphasis omitted)). See *Richards* v. *United States*, 369 U.S. 1, 5, 11 (1962) (United States' liability under the FTCA turns on state tort law). Consistent with that principle, the court of appeals correctly recognized that petitioners' false imprisonment and assault and battery claims were gov-

erned by "the substantive law of * * * the Commonwealth of Virginia." Pet. App. 24a. Under Virginia law, it is neither false imprisonment nor assault or battery for a police officer to restrain one's liberty or engage in unwanted touching if the officer's conduct was legally justified. *Id.* at 24a-25a (citing *Jordan* v. *Shands*, 500 S.E.2d 215, 218 (Va. 1998), and *Koffman* v. *Garnett*, 574 S.E.2d 258, 261 (Va. 2003)). Because police officers' use of force or restraint is justified, under Virginia law, if "reasonable" in "execut[ing] their lawful duties," *id.* at 25a, the court correctly characterized the central question in petitioners' appeal as whether "the federal agent defendants acted reasonably under Virginia law," *ibid.*

The court of appeals' discussion of this Court's Fourth Amendment precedent, see Pet. App. 28a-33a, took place entirely within this framework of Virginia's common law torts of false imprisonment and battery, *id.* at 28a. While the court of appeals noted that, in a criminal case, the Virginia Supreme Court had stated that an "officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia," Pet. App. 25a (quoting *Lewis* v. *Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997)), that does not transform the legal question whether "the federal agent defendants acted reasonably under Virginia law," *ibid.*, into a question of federal constitutional law that this Court should review. Notably, the court of appeals began its analysis of the state-law reasonableness inquiry with the premise "that Virginia has recognized that 'the safety of the officer when conducting his duties is of paramount importance,'" *id.* at 26a (quoting *Harris* v. *Commonwealth*, 400 S.E.2d 191, 194 (Va. 1991)). Likewise,

in assessing the reasonableness of the agents' actions in forcing entry into petitioners' home with respect to that aspect of petitioners' assault claim, the court again relied on Virginia law with respect to when such a forceful entry is reasonable. *Ibid.* (quoting *Lewis*, 493 S.E.2d at 399).

This Court does not generally review a federal court of appeal's determination of a question of state law. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); see Eugene Gressman et al., *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007). Although, in this case, the court of appeals looked to federal constitutional law as instructive of the state law inquiry of legal justification and reasonableness, Pet. App. 29a-31a, that discussion, as described above, was filtered through the lens of Virginia's emphasis on officer safety. Moreover, because the ultimate question is whether "the federal agents acted reasonably under Virginia law," *id.* at 25a, this Court would have to consider whether the officer's conduct, even if ultimately determined to have been unconstitutional, was nonetheless reasonable in light of the law as it existed at the time of their conduct. Notably, petitioners' arguments in support of certiorari (Pet. 10-13) rely heavily on an analysis of this Court's decision in *Muehler* v. *Mena*, 544 U.S. 93 (2005), a decision that post-dates the conduct at issue here by three years. As the district court observed in dismissing petitioners' Fourth Amendment *Bivens* claims, the agents reasonably believed their conduct was permissible at the time of their actions. Pet. App. 72a. In an analogous situation, the Ninth Circuit upheld dismissal of a plaintiff's FTCA false arrest claim under California law, even though the arrest was later determined to have violated the plaintiff's First Amendment rights, because the offi-

cer's conduct "was not a violation of clearly established law" at the time, *Galvin* v. *Hay*, 374 F.3d 739, 758 (2004), and the officers therefore "had reasonable cause to believe the arrest was lawful," *ibid.* (quoting Cal. Penal Code § 847(b)(1) (West 2008)).

Even if petitioners were correct that the court of appeals' analysis of *Muehler* was in tension with other courts of appeals, but see pp. 15-16, *infra*, the Court should address that issue in a case in which the Fourth Amendment question is cleanly presented, not where, as here, the Fourth Amendment is relevant only to the extent it sheds light on a question of state law—whether "the federal agent defendants acted reasonably under Virginia law" such that their actions were "justified" within the meaning of Virginia false imprisonment and battery law. Pet. App. 24a-25a.

b. The court of appeals' decision was, in any event, correct and does not, contrary to petitioners' contentions (Pet. 12-14, 16-21), conflict with this Court's decision in *Muehler* or decisions of the Ninth and Tenth circuits. Further review of the court of appeals' application of this Court's precedent to the particular facts of this case is not warranted.

i. The court of appeals correctly concluded that federal agents acted reasonably in detaining petitioners incident to the search of their residence for evidence related to a terrorism investigation and in handcuffing petitioners for slightly less than four hours. To the extent the Fourth Amendment was relevant to the availability of a cause of action under state law, the court of appeals recognized *Michigan* v. *Summers*, 452 U.S. 692 (1981), and *Muehler* v. *Mena*, 544 U.S. 93, 99-100 (2005), as the leading authorities and correctly observed that, under those decisions, the propriety of handcuffing indi-

viduals detained during a search depends on whether "the governmental interests" in handcuffing "outweigh the marginal intrusion" it imposes. Pet. App. 31a (quoting *Muehler*, 544 U.S. at 99-100); see *id.* at 29a ("[i]nherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention," including handcuffs) (quoting *Muehler*, 544 U.S. at 98-99).

The court of appeals concluded that, under the particular facts and circumstances of this case, the agents acted reasonably in detaining petitioners incident to the search and in imposing the additional intrusion of handcuffing them during part of the search. Although the agents were searching for "financial documents only—and not for either weapons or persons—a reasonable officer would have had legitimate safety concerns under the[] circumstances." Pet. App. 31a. The court noted that the agents were executing the warrant "at a residence believed to contain evidence of money laundering by entities suspected of assisting international terrorism," which meant that, "[v]iewed objectively, the agents did not know whether they would be confronted by resistance." *Id.* at 31a-32a. In that context, and in light of petitioners' "excitement" and "agitated" state when the agents entered the residence, the agents acted reasonably by initially handcuffing petitioners. *Id.* at 32a. Nor, in light of petitioners' behavior at the time of entry, did the officers act unreasonably in keeping petitioners in handcuffs while the agents executed the "terrorism-related warrant." *Ibid.* The court stressed that the agents had moved the handcuffs from the back to the front to make petitioners more comfortable and later, after reassessing the situation, removed the handcuffs entirely. *Id.* at 32a-33a.

Contrary to petitioners' arguments (Pet. 12), *Summers* and *Muehler* do not authorize restraint of an occupant during execution of a search warrant "only in the context of searches for contraband." Pet. 13. Although the facts of *Summers* and *Muehler* involved searches for contraband, they stand for the broader proposition that the governmental interests in detaining and handcuffing the occupants of a location while it is searched can, in appropriate circumstances, outweigh the intrusion on the individual's liberty. Neither decision holds that contraband searches are the *only* context in which such constraints are appropriate. While Justice Kennedy's concurring opinion observed that "police handcuffing during searches" should "become[] neither routine nor unduly prolonged," *Muehler*, 544 U.S. at 102, he recognized that concerns for officer safety, the risk of interference, and delay of the search are all relevant factors in assessing the reasonableness of the use of handcuffs. *Id.* at 103. Justice Kennedy urged that the passage of prolonged time "require[s] revisiting the necessity of handcuffing," *ibid.*, which is precisely what happened here, where petitioners were initially handcuffed behind their backs, later handcuffed in front, and later freed from handcuffs altogether when the agent in charge deemed the situation warranted it. Pet. App. 32a-33a.

Neither *Summers* nor *Muehler* precludes the possibility that significant governmental interests—such as guarding against potential dangers posed by the subject of the search's ties to violent terrorist organizations, or by the particular circumstances of resistance that the officers on the scene confront—might make it reasonable for agents to detain and handcuff the occupants of a house during the execution of a warrant. The court of

appeals' holding does not conflict with this Court's precedent, and no further review is warranted.

ii. For similar reasons, the court of appeals' decision also does not conflict with decisions of the Ninth and Tenth Circuits identified by petitioners. See Pet. 16-21 (citing cases). The subject-matter of the search of course is relevant to deciding whether the governmental interest in controlling the scene of the search through handcuffing the occupants of the search location outweighs the burdens imposed on those individuals. And, contrary to petitioners' arguments, the court of appeals in this case did not hold "that it made no difference that the officers were executing a warrant seeking financial records, as opposed to contraband," Pet. 21; rather, the court recognized the significance of the fact that the evidence the officers were seeking consisted of financial records related to "entities suspected of assisting international terrorism." Pet. App. 31a-32a. Petitioners disagree with the lower courts' conclusion that officers in the federal agents' situation would have reason to be concerned for their safety and their control of the search scene while executing a warrant relating to terrorism financing. But nothing in the decisions from the Ninth and Tenth Circuits upon which petitioners rely suggests that those courts would refuse to consider whether a search might, under particular circumstances, present a sufficient threat to governmental interests to justify detention and handcuffing even though the search was not for contraband. Like the Fourth Circuit, the Ninth and Tenth Circuits recognize that the reasonableness of detention pursuant to search, including handcuffing, must be assessed in light of the circumstances of the case. See *Tekle* v. *United States*, 511 F.3d 839, 849-850 (9th Cir. 2007); *Denver Justice & Peace Comm., Inc.* v.

City of Golden, 405 F.3d 923, 929, 929-931 (10th Cir. 2005), cert. dismissed, 546 U.S. 1146 (2006). Neither the Ninth nor the Tenth Circuit has addressed the reasonableness of handcuffing in circumstances such as those in this case. Nor is there any need for this Court to review the court of appeals' analysis of Fourth Amendment precedent on the particular facts of this case, particularly because the Fourth Amendment analysis was solely in aid of the ultimate question whether "the federal agent defendants acted reasonably under Virginia law." Pet. App. 25a.

2. Petitioners also contend (Pet. 21-25) that the court of appeals erred in "holding that the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit" as a claim against the United States under the FTCA. Pet. 22. See Pet. 24 (citing conflict regarding whether "the judgment bar applies to contemporaneous *Bivens* claims"). Petitioners did not raise that argument in the court of appeals. Review of petitioners' second question presented is therefore unwarranted. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (petitioner should not be heard to "assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing").

A. Before the court of appeals, petitioners only challenged application of the judgment bar to their First Amendment claim, arguing that "[petitioners'] First Amendment claims do not relate to the 'same subject matter' as [petitioners'] common law claims that were dismissed on summary judgment." Appellants' Reply

Br. 4 (quoting 28 U.S.C. 2676).[2] Petitioners went on to argue that "[t]he subject matter of [petitioners'] First Amendment claims is violation of their rights to freely exercise their religion" in connection with their prayers, whereas "the subject matter of [petitioners'] common law claims [was] the agents' assault, battery and imprisonment of [petitioners] in handcuffs." *Ibid.* Because, petitioners maintained, the First Amendment claims stemmed from different "actions" and different "injuries," the judgment bar should not apply. *Ibid.* Petitioners did not contend, as they do in this Court, that the fact that the *Bivens* and FTCA claims were litigated in the same suit rendered the judgment bar inapplicable, Pet. 22.

The court of appeals addressed the argument petitioners advanced, *i.e.*, that their *Bivens* claims were "predicated on different conduct and allege distinct injuries from the FTCA claims," Pet. App. 35a, and properly rejected petitioners' attempt to narrow the reach of the judgment bar in that fashion. The court recognized that "[i]n order for § 2676 to have effect, it must encompass all of the claims that could have been brought with regard to the conduct at issue against the responsible 'employee of the government.'" *Ibid.* (quoting Section 2676); see *id.* at 34a-35a (*Bivens* claims are "by reason of the same subject matter" so long as they "aris[e] out of the same actions, transactions, or occurrences" as an FTCA claim). Because "the district court properly awarded summary judgment to the United States on the FTCA claims," and "[t]hose claims arose out of the 'same subject matter' as the * * * *Bivens* subclaims,"

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[2] Petitioners did not address the judgment bar in their opening Brief of Appellants.

the *Bivens* claims were precluded under Section 2676 by "the court's summary judgment award on the FTCA claims." *Id.* at 36a (quoting 28 U.S.C. 2676).

Petitioners do not contend that the court of appeals' holding with respect to the "same subject matter" requirement conflicts with any decision of this Court or of any other court of appeals. Rather, petitioners urge this Court to addresss a different issue, whether "the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit" or is instead "limited to the dismissal of FTCA claims in a separate action." Pet. 22. Petitioners urge that "[t]he Sixth and Seventh Circuits expressly rejected the Ninth Circuit's holding in *Kreines* [v. *United States*, 959 F.2d 834 (1992),] and found that the judgment bar applies to contemporaneous *Bivens* claims regardless of who prevails on the FTCA claim." Pet. 24. Notably, petitioners do not contend that the court of appeals' decision in this case expressly rejected *Kreines*, which petitioners' court of appeals briefs did not cite, or that the decision below even mentioned that purported circuit conflict. Petitioners should not be permitted to attack the court of appeals' decision in this Court based on a new argument that it failed to raise below.

B. In any event, the court of appeals was correct to apply the judgment bar in this case, even though the *Bivens* and FTCA claims were brought in the same suit, and there is no clear conflict among the courts of appeals on that issue that would warrant this Court's review even if the question were properly presented in this case.

i. The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."

Dalehite v. *United States*, 346 U.S. 15, 24 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). Before the FTCA's enactment, parties injured by a government employee's actions were forced to seek relief through private bills in Congress, *ibid.*, or by suing the government employee in his individual capacity, *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage suits." *Ibid.* They also represented a burden on government resources, because "the Government, through the Department of Justice, [was] constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

Since the FTCA's enactment, the judgment bar has been an integral part of the statutory scheme. Section 2676 provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. In other words, once the FTCA action is the subject of a judgment, that judgment cuts off the claimant's ability to pursue relief against government employees individually. By enacting the FTCA, Congress offered plaintiffs the opportunity, subject to certain limits, to sue a financially responsible defendant. Through the judgment bar, Congress ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would protect federal employees against the threat and distraction of litigation, and protect as well the government from having to expend its

resources defending against further litigation arising out of the same incident. See *Gilman*, 347 U.S. at 511 n.2.

Consistent with the provision's purposes, the courts of appeals have uniformly acknowledged that the judgment bar applies even when the plaintiff brings her claims against the United States and claims against the individual federal employee in a single lawsuit. Numerous courts had so recognized before enactment of the Westfall Act in 1988, when federal employees could still be sued for common law torts committed within the scope of their employment. See, *e.g.*, *Aetna Cas. & Sur. Co.* v. *United States*, 570 F.2d 1197, 1201 (4th Cir.) ("[A] judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [the government employees]."), cert. denied, 439 U.S. 821 (1978); *Gilman* v. *United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("[T]he moment judgment was entered against the Government, then by virtue of § 2676 * * * the employee [who had been impleaded] was no longer primarily answerable to the claimant,—he was not answerable at all."), aff'd, 347 U.S. 507 (1954); *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of [Section 2676] order judgment against [the government employee] in favor of [the plaintiff] in the same action.").

The courts of appeals have continued to apply that rule after the Westfall Act's adoption. Although Congress excepted *Bivens* claims from the Westfall Act's exclusivity and substitution provisions, 28 U.S.C. 2679(b)(2)(A), it made no such exception to the judgment

bar, as to which Congress's concern about defending multiple claims against the United States and individual employee defendants remains the same. And the courts of appeals have continued to apply the judgment bar when plaintiffs join in a single suit their FTCA claims against the United States and *Bivens* claims against federal employees individually. See, *e.g.*, *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008), cert. denied, 130 S. Ct. 552 (2009); *Harris* v. *United States*, 422 F.3d 322, 334 (6th Cir. 2005) ("In accordance with the consistent application of the judgment bar over the fifty years since its enactment, we have held that [Section 2676] applies even when the claims were tried together in the same suit.") (quotation marks and citation omitted); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840 (10th Cir. 2005) (applying Section 2676 to bar a *Bivens* judgment entered prior to the FTCA judgment in the same suit); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (holding that plaintiff's FTCA judgment against the United States barred his *Bivens* judgment in the same suit); see also *Denson* v. *United States*, 574 F.3d 1318, 1334 n.50 (11th Cir. 2009) (noting that "[a] majority of courts have construed § 2676 as barring a plaintiff's *Bivens* claims, irrespective of whether the Bivens and FTCA claims were brought in the same lawsuit").

ii. Petitioner contends (Pet. 22-23) that in *Kreines* v. *United States*, 959 F.2d 854 (1992), the Ninth Circuit departed from the consensus of the courts of appeals that an FTCA judgment bars *Bivens* claims brought in the same action. But the Ninth Circuit, like the other courts to consider the issue, has held that Section 2676 does apply when *Bivens* and FTCA claims are brought in the same action; at most, *Kreines* carved out an ex-

ception to that rule. And in any event, the reasoning behind *Kreines*'s exception is inconsistent with prior Ninth Circuit precedent and has been undermined by subsequent decisions of that court as well. That inconsistency, which amounts to an intra-circuit conflict within the Ninth Circuit, does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

As noted above, long before *Kreines*, the Ninth Circuit had recognized that an FTCA judgment bars a judgment against the federal employee even though the claims were brought simultaneously in the same suit. See *Arevalo* v. *Woods*, 811 F.2d 487, 490 (1987) ("The moment judgment was entered against the government, then by virtue of section 2676, [the federal employee] was no longer answerable to [plaintiff] for damages," though both claims were raised in a single action.); *Gilman*, 206 F.2d at 848 ("[T]he moment judgment was entered against the Government, then by virtue of § 2676 * * * the employee was no longer primarily answerable to the claimant,—he was not answerable at all.").

In *Kreines*, the panel acknowledged that *Arevalo* had held that, pursuant to Section 2676, an FTCA judgment "barred a contemporaneous *Bivens* judgment against a federal employee" in the same suit. *Kreines*, 959 F.2d at 838. The *Kreines* court established an exception to that rule, holding that when the government prevailed on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit. *Ibid.* The court reasoned that Section 2676 was "ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous *Bivens* judgment." *Ibid.* Because the

court viewed the primary purpose of Section 2676 was preventing dual recoveries arising from subsequent litigation, the court concluded that Section 2676 should not bar a contemporaneous *Bivens* recovery when the government prevailed on the plaintiff's FTCA claim.

Two years after *Kreines*, however, the Ninth Circuit limited *Kreines* to its facts and cast doubt on its reasoning. See *Gasho* v. *United States*, 39 F.3d 1420, 1437 (1994), cert. denied, 515 U.S. 1144 (1995). *Gasho* concerned the application of the judgment bar to a plaintiff's *Bivens* claims when the plaintiff had already brought and lost FTCA claims in a separate suit. The court held that "[t]he language [of Section 2676] is not 'ambiguous' or 'vague,'" and that—contrary to *Kreines*' reasoning—the provision's plain language dictated that the judgment bar should apply regardless of whether the plaintiff had prevailed or lost on the FTCA claims. *Ibid.* ("The statute speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the government."). The court also cast doubt on *Kreines*'s reading of Section 2676's legislative history, concluding that because Congress was concerned not only with preventing dual recoveries, but also with protecting the government's resources in defending itself and its employees, the concerns animating the judgment bar are implicated even when there is no double recovery. *Ibid.* Thus, although *Gasho* concerned the application of Section 2676 to a subsequent suit, rather than to claims within a single suit (as in *Kreines*), *Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous and that its application within a single suit should depend on whether the FTCA judgment was favorable or unfavorable to the plaintiff.

In light of *Gasho*, and given that the Ninth Circuit has not applied *Kreines*'s holding in any subsequent decision, it is entirely possible that the Ninth Circuit will reconsider its position should the opportunity arise. That is particularly so given the consensus that has broadened since *Kreines* was decided, to the effect that Section 2676 applies to claims in "any action," regardless of whether the claims are brought within one action or the plaintiff prevailed on the FTCA claims.

The Court recently denied a petition for certiorari raising the same issue as the second question presented by petitioners. See *Manning* v. *United States*, 130 S. Ct. 552 (2009). There is no reason for a different result in this case, especially because petitioners failed to raise the issue before the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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